No. 3199

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY (a corporation), claimant of the American Steam Tug "Fearless", her boilers, engines, tackle, apparel and furniture,

Appellant,

vs.

A. H. BULL & COMPANY, INC. (a corporation),

Appellee.

REPLY BRIEF FOR APPELLEE.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

E. S. PILLSBURY,
F. D. MADISON,
ALFRED SUTRO,
OSCAR SUTRO,
Proctors for Appellee.

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Appellant's counsel now makes the suggestion that on the argument in this court we attempted to mislead the court in respect to the possible presence of the "Edith's" log books at the trial in the court below. At the same time counsel incorrectly states what we said at page 52 of our opening brief. (Appellant's Reply, p. 22.)

We stated at the argument that it was our impression that we had exhibited copies of the log books to oppos-

ing counsel; that our recollection was not sufficiently clear on the subject to justify a positive statement in that respect. No demand of any kind having been made after the case was set for trial before Judge Dooling, nor during the trial, for the production of the log books, there was obviously no occasion to bring them to court, and our recollection is clear, of course, that the books were not in court. We made no statement to this court to the contrary.

Claiming that he thought the court had been misled by our remarks on this subject, Mr. Denman, of appellant's counsel, requested that we address a letter to this court stating the facts. This we did by letter dated November 19, 1918, as follows:

> "To the Honorable, the Judges of the United States Circuit Court of Appeals, Ninth Circuit.
>
> Dear Sirs:
>
> Mr. Denman, counsel for appellant in the above case, has requested that I state to the court the facts in regard to the logs of the steamship 'Edith.' I therefore take the liberty of addressing this letter to the court.
>
> Mr. Denman observes that the trial has 'wandered * * * far out of the record,' and refers to our remarks at page 59 of our brief. We there say that none of the cases cited by him hold that
>
> > 'there is a presumption that the demand for the log books of a vessel was refused because the record does not affirmatively show that the logs were produced. Indeed it may well be that in this case the logs, or copies thereof, were exhibited *by* (should be *to*) counsel for claimant during the progress of the trial, and that he considered them of as little consequence on the issues involved in this case as did counsel for the libelant.'

Mr. Denman is apprehensive that the quoted matter may mislead the court as 'an out of record statement of fact.' It is argument pure and simple, and the court no doubt will so consider it.

In point of fact, the depositions taken in New York contain the only demand in the record for the logs. The depositions were filed but were not read at the trial. Whether or not the logs were produced in New York when the demand was made does not appear; the record is silent in this regard. The fact, however, is that from the time the depositions were taken in New York in March, 1917, until the filing of appellant's brief in this court in October, 1918, neither the court nor counsel on either side made mention of either the original log books or their presence or absence. There was, therefore, no occasion to have had them in court. I was under the impression that at the trial before Judge Dooling I showed Mr. Campbell copies of the logs, but that he evinced no interest in them. If his recollection differs from mine on this point, I am willing to abide by his.

I am sending a copy of this letter to Mr. Denman.

Very respectfully,

Oscar Sutro."

In the face of the concluding statement in the foregoing letter, appellant's counsel telegraphed to Mr. Campbell, giving his own recollection, the recollection of Captain Gray, and reply from Mr. Campbell followed that we are mistaken in our recollection.

Therefore, says counsel, the court now knows that the logs were not produced, "nor their production waived". (Appellant's Reply, p. 24.)

This method of supplementing the record is new in the practice as we know it. It would appear that counsel's request to us to clear up what he deemed an

ambiguity in our argument to the court was to lay the foundation for correspondence which might be injected into a reply brief, and which is found at page 24 of appellant's reply. Mr. Denman's apparent purpose is, by the use of correspondence between various counsel for appellant, framed to supplement an otherwise silent record, to bolster up a position which on the record is untenable.

The further suggestion is now made by counsel in a brief served on us one month after the argument, that the log books should have been produced at the hearing in this court. Counsel's complaint at the argument was that these books were not produced in the court below, and until the filing of his reply on November 27, 1918, not the slightest intimation or suggestion was made by counsel for appellant that he either desired to see the log books, or that their inspection would be helpful to him in the preparation of his appeal.

THE LOGS WERE NOT USED IN EVIDENCE BY EITHER SIDE BECAUSE THE MATERIAL FACTS ARE UNDISPUTED.

We suggested in our brief that the logs were not used in evidence by counsel on either side, because they could throw no light on the salient facts of the case. An examination of the grounds on which appellant thinks the logs were material confirms our argument.

I. Appellant suggests the log books were important to determine:

the captain of the "Edith's" "causal responsibility" as related to the stoppage of the engines. (Appellant's Reply, pp. 1-9.)

But every witness in the case agreed that when the tug cast off the line it was the captain's duty to stop his engines. (Appellant's Brief, pp. 11-14.) It is admitted that the "Edith's" mate signalled the captain to stop his engines immediately after the line was cast off (Claimant's Answer, p. 15), and not disputed that the captain stopped his engines immediately upon the signal.

Nor was the element of time between the dropping of the line and the collision in serious dispute. The tug witnesses swore that it was five to seven minutes. (Apostles, pp. 330, 176, 337.) The tug's captain knew, as an expert, that when the line was dropped it was necessary to stop the engines, and he required no information from the "Edith's" master on the subject. (Apostles, p. 324; Appellee's Brief, pp. 13-14.)

The logs could clear up nothing here.

II. Appellant argues that:

the "Edith" could have saved herself by dropping her anchors. (Appellant's Reply, pp. 9-16.)

The captain did not drop them: at first, because it would have blocked the tug's maneuver; later, because it would have been dangerous, as is admitted by the tug's witnesses. (Appellee's Brief, pp. 33-36.) In any event, *it is an undisputed fact in the case that the anchors were not dropped.* The logs could add nothing to the admitted fact.

The case of *The M. E. Luckenbach*, 200 Fed. 630, cited by counsel in this connection, is clearly distinguishable, for there, one of three barges was cast adrift and failed to anchor after the tug, which had charge of the operation, ordered it to anchor.

III. Appellant argues that

> **the "Edith" could have reversed her engines and have saved herself.** (Appellant's Reply, pp. 17-20.)

She did not reverse: at first, because until the line which the tug had cast off was hauled in, her engines had to be stopped to prevent further or any fouling. All of the witnesses agreed on this (Appellee's Brief, p. 13, pp. 38-39); later, when she did reverse, she was *in extremis*.

In any case it is an undisputed fact that the "Edith's" engines were either stopped or remained stopped after the tow line was cast off, and that they were not reversed until the line had been hauled in and the vessel *in extremis*. Again the logs could show no more than the undisputed facts.

IV. Finally counsel makes the point that

> **the line of the tug "was unloosened" when the "Edith's" engines were stopped.** (Appellant's Brief, pp. 20-22.)

We referred in our brief to the admission in the answer that the tug cast off the line while the "Edith's" engines were turning (Appellee's Brief, p. 16), and while some of the witnesses testified that the "Edith's" engines were stopped when the tow line was dropped (ib. p. 6, Apostles, p. 313), others said the engines were

turning at the time. (Apostles, pp. 97, 192, 197.) But, as pointed out in our brief (p. 16), the casting off of the tow line required the engines to be stopped, and the "Edith" was bound to drift while the line was being hauled in.

The logs could add nothing to the facts for whether they showed the engines turning or not, when the tow line was dropped, the fact that it was dropped without notice rendered the "Edith" equally helpless until it was hauled in and justified the captain's reliance on the tug to complete the operation.

Finally, we note the argument that the logs might have shown that the "Edith" reversed her engines "till she was 700 feet out into the stream, and that her stopping indicated that this was as far as she intended to go." (Appellant's Brief, p. 21.) This is not disputed by either side in the case.

The logs, therefore, would add nothing on this point.

The difficulty with the tug's case is that it dropped the tow line at a distance of 700 feet from the docks without notice to the "Edith" and thus rendered impossible the movement contemplated by the captain of the "Edith," namely, to pivot his vessel while the tug held fast to the stern of the ship. As counsel now admits the "Edith's" captain "had command of the maneuver at any rate till the line was dropped." (Appellant's Reply, p. 21.) After that the tug was responsible, the tug's captain having assumed to act on his own judgment.

These, then, are the four points advanced by counsel as subject to illumination by the production of the logs. In each the facts are admitted.

Is it not obvious from counsel's argument that there was no issue in the case on which the logs could be material, and no facts to be proved by the logs? And is that not plainly the reason why so careful an attorney as Mr. Campbell neither demanded the log books, nor noted their absence, and that they have no importance except such as Mr. Denman now seeks to attribute to the failure to use them as evidence?

We except to the suggestion made by appellant at page 7 of the reply that counsel for libellant in New York or here were "reluctant" regarding the production of evidence. It is a gratuitous statement unfounded in fact and unwarranted by the record.

There is one point concerning the merits of the case which the appellant for the first time emphasizes in its last brief. It seems to be assumed by appellant that sinister purposes underlay the error of the captain as to the distance at which he found himself from pier No. 42 at the moment that the tug dropped her tow without warning to him. Considering the "Edith's" captain's unfamiliarity with San Francisco harbor, the varying lengths of the piers opposite which he was cast adrift, the rapid succession of events, and the excitement of the occasion, it is not remarkable that twelve months later, in giving his deposition in New York, he should have erroneously estimated his distance from the piers when the tug dropped her tow. In any event,

the further out he was, the easier it was for the tug to perform the maneuver contemplated by her, and the less excuse there was for the tug's letting go of the tow.

The argument of appellant that the accident was caused by the "Edith's" failure to drop her anchors is already answered in our brief, but it may be appropriate to point out that at best dropping anchors in such a case is a recourse *in extremis* which may *prevent* an accident; but that the failure to drop them does not, therefore, *cause* the accident.

The gist of appellant's reply is based on the suggestion of non-production of testimony, the possible relevancy of which to the issues in this case is not apparent. The *tug* is the vessel whose conduct is under investigation. It is useless to attempt to shift the issue. If the tug was not justified in her conduct, the decree should be affirmed. Whether or not she was justified was at least the principal issue under investigation by the trial court, and on which the determination of this controversy rested. No conduct on the part of the "Edith" could have rendered her solely liable, for at best any maneuver which she might have undertaken would have been defensive and to save herself *in extremis* from the actions of the tug. The case was so viewed and tried by the court and by all counsel until the advent of Mr. Denman in the case. On those issues the non-production of the evidence of which he now complains could have thrown no light. We submit that it is too late now to urge this court to reverse a decree because testimony was not adduced which counsel on neither side asked for, and which counsel on neither

side apparently wanted, and the absence of which was not even called to the attention of or noted by the trial court.

We submit that the decree should be affirmed.

Dated, San Francisco,
December 2, 1918.

Respectfully submitted,

E. S. Pillsbury,
F. D. Madison,
Alfred Sutro,
Oscar Sutro,
Proctors for Appellee.